

JENNIFER HARTMAN KING (SBN 211313)
ALANNA LUNGREN (SBN 269668)
WILLIAM D. MARSH (SBN 200082)
J. R. PARKER (SBN 320526)
ANDREYA WOO NAZAL (SBN 327651)
HARTMAN KING PC
520 Capitol Mall, Suite 750
Sacramento, CA 95814
Telephone: (916) 379-7530 Facsimile: (916) 379-7535
JHartmanKing@HartmanKingLaw.com
ALungren@HartmanKingLaw.com
WMarsh@HartmanKingLaw.com
JRParker@HartmanKingLaw.com
AWooNazal@HartmanKingLaw.com

Exempt From Filing Fees Pursuant
To Government Code Section 6103

Attorneys for Defendants KATHLEEN ALLISON,
in her official capacity as Secretary of the California Department
of Corrections and Rehabilitation; and PATRICK COVELLO,
in his official capacity as Warden of California Department of
Corrections and Rehabilitation Mule Creek State Prison

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA SPORTFISHING
PROTECTION ALLIANCE,

Plaintiff,

v.

KATHLEEN ALLISON, in her official
capacity as Secretary of the California
Department of Corrections and Rehabilitation,

Defendant.

COUNTY OF AMADOR, *a public agency of
the State of California*,

Plaintiff,

v.

KATHLEEN ALLISON, in her official
capacity as Secretary of the California
Department of Corrections and Rehabilitation;
and PATRICK COVELLO, in his official
capacity as Warden of California Department
of Corrections and Rehabilitation Mule Creek
State Prison,

Defendants.

Case No. 2:20-CV-02482-WBS-AC
[consolidated with 2:21-CV-00038-WBS-AC]

**DECLARATION OF WILLIAM D.
MARSH IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

Date: January 9, 2023
Time: 1:30 p.m.
Judge: Hon. William B. Shubb
Ctrm. 5

(Federal Water Pollution Control Act, 33
U.S.C. §§ 1251 to 1387)

Final Pretrial Conf.: February 13, 2023
Trial Setting Conf.: April 18, 2023

1 I, William D. Marsh, declare as follows:

2 1. I am Senior Counsel at the law firm Hartman King PC, counsel of record for
3 Defendants KATHLEEN ALLISON, in her official capacity as Secretary of the California
4 Department of Corrections and Rehabilitation and PATRICK COVELLO, in his official
5 capacity as Warden of California Department of Corrections and Rehabilitation Mule Creek
6 State Prison ("Defendants"). I submit this declaration in support of Defendants' Motion for
7 Summary Judgment and unless otherwise specified, I have personal knowledge of the matters
8 set forth herein and, if called as a witness, could and would competently testify thereto.

9 2. Attached hereto as Exhibit A is a true and correct copy of the California
10 Department of Corrections and Rehabilitation's letter to the Central Valley Regional Water
11 Quality Control Board ("Regional Water Board") dated January 21, 2021.

12 3. On September 22, 2022 I attended the deposition of Elizabeth Lee from the
13 Regional Water Board in which she was asked several questions regarding receiving water
14 limitations of the Small MS4 Permit. Attached hereto as Exhibit B is a true and correct copy of
15 excerpts from the deposition transcript of Ms. Lee, dated September 22, 2022.

16
17 I declare under the laws of the State of California under penalty of perjury that the
18 foregoing is true and correct.

19
20 Executed on December 22, 2022, at Orinda, California.

21
22 
23 _____
24 WILLIAM D. MARSH

25
26
27
28

EXHIBIT A

DIVISION OF ADULT INSTITUTIONS

MULE CREEK STATE PRISON

4001 Highway 104
P.O. Box 409099
Ione, CA, 95640



Date: January 21, 2021

State of California Water Resources Control Board
Central Valley Regional Water Quality Control Board
Sacramento Office
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670-6114

Attention: Ms. Elizabeth Lee
Senior Water Resource Control Engineer

***MULE CREEK STATE PRISON (MCSP) COMMENTS TO 22 December, 2020
WATER CODE SECTION 13383 ORDER TO MONITOR DISCHARGES TO SURFACE
WATER; CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION –
MULE CREEK STATE PRISON, WDID#:5S03M2000307, AMADOR COUNTY***

Dear Ms. Lee,

Please find our comments below to the above referenced order.

8. D. Non-Storm Water Discharge Report. *The Permittee shall submit a Non-Storm Water Discharge Report by 1 February 2021.*

The Central Valley Regional Water Quality Control Board ("CVRWQCB") cites flowmeter readings from MCSP5 and MCSP6 as representative of non-storm water discharge to Mule Creek, and justification for the preparation and submission of a "Non-Storm Water Discharge Report". However, flowmeter readings from MCSP 5 and MCSP 6, reported weekly to the CVRWQCB, in response to a 13267 order, are not representative of non-storm water discharge from the MCSP MS4 system to Mule Creek, and provide no indication as to whether non-stormwater is discharged to Mule Creek. . These flowmeter locations are a substantial distance up-stream from the points of discharge to Mule Creek ("points of compliance"). Specifically, MCSP 5 is 630 feet up-stream from the point of compliance at MCSP 2, and MCSP 6 is 1500 feet up-stream from the point of compliance at MCSP 3. MCSP has is developing a plan to relocate the flowmeters from MCSP 5 and MCSP 6 to points of compliance MCSP 2 and MCSP 3, in order to accurately record actual discharges to Mule Creek through MCSP points of compliance.

Non-storm water flow recorded at MCSP 5 and MCSP 6 results from defects in the potable water, landscape irrigation system at the facility, and can be correlated with irrigation meter readings when the irrigation system is in use. MCSP is taking steps to repair the landscape irrigation system to address this identified non-storm water flow.

The non-storm water, landscape irrigation runoff recorded at MCSP 5 and MCSP 6 does not discharge to Mule Creek and is retained on MCSP property within the constructed earthen channels that run between MCSP 5 and MCSP 2, and MCSP 6 and MCSP 3. MCSP takes photographs daily of locations MCSP 5, MCSP 6, Main Junction Vault, Secondary Junction Vault, and Points of Compliance MCSP 2 and MCSP 3. These photographs are included in the Weekly Status Report that is submitted to the CVRWQCB every week by SHN on behalf of MCSP. MCSP has not observed non-storm water discharges through the MS4 system to Mule Creek.

The photographs provided within the Weekly Status Report to the CVRWQCB provide verification that non-storm water is not discharged to Mule Creek, even during times of high non-storm water flow readings at MCSP 5 and MCSP 6.

Based on the provided information, and Weekly Status Reports submitted to the CVRWQCB in response to the 13267 order, MCSP believes the Non-Storm Water Discharge Report due on February 1, 2021, is not warranted and requests that this requirement be removed from the Order.

E. Discharge Notification. *The Permittee shall notify the Central Valley Water Board within 24 hours of the Facility discharging through the MS4 to the receiving water.*

Please confirm the preferred method (*verbal, written, electronic*) of notification to the CVRWQCB.

I. MONITORING LOCATIONS

A. Monitoring Locations. *The Permittee shall establish the monitoring locations identified in Table A.*

Table A. Monitoring Station Locations

Discharge Point Name	Monitoring Location Name	Monitoring Location Description ¹
--	RAIN-1	Rain gage located at the Mule Creek Wastewater Treatment Plant
--	MCSP1 (RSW-001)	Upstream receiving water location
001	MCSP5 (OUTFALL-1)	MS4 slide gate
002	MCSP6 (OUTFALL-2)	MS4 slide gate
--	MCSP4 (RSW-002)	Downstream receiving water location approximately 200 feet downstream (south) of MCSP3.

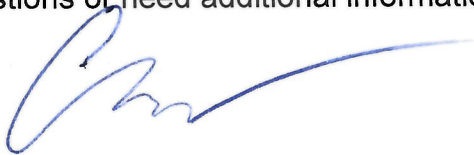
MCSP 5 and MCSP 6 are within the MCSP storm water management system, and are not representative of what MCSP discharges to Mule Creek in either water quality or volume.

MCSP requests monitoring locations MCSP 5 and MCSP 6 be replaced with monitoring at MCSP 2 and MCSP 3, which will represent the MCSP MS4 system discharge to Mule Creek.

Please note that MCSP submitted similar comments and a request for information on November 13, 2020, in response to the November 5, 2020 proposed reissuance of 13383 Order to Monitor Discharges. MCSP also provided this feedback to CVRWQCB staff on November 19, 2020, during a site visit and inspection conducted by the CVRWQCB and USEPA. MCSP has not received a response from the CVRWQCB to the submitted comments and information request.

MCSP respectfully requests a response from the CVRWQCB to the comments provided and information requested in this letter.

Thank you for your consideration in this matter. Please let me know if you have any questions or need additional information.

A handwritten signature in blue ink, appearing to read 'Chris Hudgens', with a long horizontal flourish extending to the right.

CHRISTOFER HUDGENS
Correctional Plant Manager II
Mule Creek State Prison

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
ROBERT T. MATSUI FEDERAL COURTHOUSE

CALIFORNIA SPORTFISHING)	
PROTECTION ALLIANCE,)	
)	
Plaintiff,)	
)	Case No.
)	2:20-cv-02482-WBS-AC
vs.)	
)	
KATHLEEN ALLISON, etc.,)	
)	
Defendants.)	
_____)	

REMOTE VIDEOTAPED DEPOSITION OF ELIZABETH LEE
TAKEN BY A CERTIFIED COURT REPORTER
THURSDAY, SEPTEMBER 22, 2022
at 9:05 a.m.

Reported By: LISA MAKOWSKI, CCR 345, CA CSR 13400
JOB NO: 73909

September 22, 2022

1 Q. Okay. And later on in that paragraph,
2 there is a sentence that starts with, "Finally, the
3 permittee identified MCSP 5 and MCSP 6 as the
4 outfall for purposes of the 13883 order and small
5 MS4 general permit due to the absence of monitoring
6 infrastructure at the true outfall locations MCSP 2
7 and MCSP 3." Do you see that sentence?

8 A. Yes.

9 Q. And earlier we had been talking about
10 whether CDCR requested that the monitoring points
11 be changed to MCSP 5 and MCSP 6. Does this
12 sentence sort of change your memory or trigger your
13 memory as to how MCSP 5 and MCSP 6 were identified?

14 A. No, not exactly.

15 Q. Okay. And that -- the end of that
16 paragraph says, "Unless and until the permittee
17 installs monitoring at MCSP 2 and MCSP 3,
18 discharges monitored at MCSP 5 and MCSP 6," and I
19 am skipping, "will be assumed to represent the MS4
20 discharges to Mule Creek for compliance purposes."

21 And is that sentence just reiterating that they
22 are the points where the Regional Board will
23 determine compliance with discharge prohibitions?

24 A. Yes.

25 Q. And is that also -- are those also the

September 22, 2022

1 points that the Regional Board is determining
2 whether CDCR is complying with receiving water
3 limitations?

4 **A. At two and three?**

5 Q. I'm sorry, at five and six.

6 **A. I don't believe -- or receiving water**
7 **limitations.**

8 Q. Yeah. And I can -- it is kind of hard.
9 We have to kind of go back and forth. But
10 Exhibit 8 is the excerpt of the small MS4 permit in
11 receiving water limitations. State that,
12 "Discharges shall not cause or contribute to an
13 exceedance of water quality standards contained in
14 the State Water Quality Control Plan, the
15 California Toxics Rule or in the applicable
16 Regional Water Board Basin Plan."

17 So do you in your role overseeing compliance,
18 would you use sampling conducted at MCSP 5 and MCSP
19 to ascertain whether discharges met that?

20 **A. No.**

21 Q. No. And what information would you use
22 to determine whether a permit was meeting the
23 receiving water limitations?

24 **A. I believe we indicated on the order**
25 **itself another monitoring location that is the**

September 22, 2022

1 receiving water.

2 Q. And is that MCSP 4?

3 A. Off the top of my head, it probably is.

4 Yes, it is.

5 Q. Okay. And would you also compare the
6 pollutants in the discharges from the facility in
7 addition to the receiving water --

8 MR. MARSH: Which discharges?

9 MS. MAHARG: I am not finished.

10 MR. MARSH: I apologize.

11 BY MS. MAHARG:

12 Q. Let me just start that question over. In
13 addition to assessing -- or, I'm sorry. In
14 addition to reviewing the monitoring at MCSP 4,
15 which is within Mule Creek, would you also look at
16 the pollutants or the monitoring of the facility's
17 storm water discharges to determine whether they
18 were in compliance with receiving water
19 limitations?

20 MR. MARSH: Vague and ambiguous.

21 THE WITNESS: So you are asking whether I
22 look at the data from MCSP 2 and three, the
23 discharges, and use that to determine if they are
24 in compliance with the receiving water limitations?
25 Is that your question?

September 22, 2022

1 BY MS. MAHARG:

2 Q. Yes. With the caveat that you are also
3 looking at MCSP 4. So kind of all of that data
4 together.

5 A. Yes, I may. Yes.

6 Q. Since the facility isn't sampling at MCSP
7 2 and MCSP 3, would you look at the monitoring that
8 has been conducted at MCSP 5 and MCSP 6 as well as
9 MCSP 4 to determine compliance with the receiving
10 water limitations?

11 A. Correct because five and six was the
12 revised compliance points for the December 2020,
13 order.

14 MS. MAHARG: Okay. And I think I am
15 actually done with that exhibit. We have been
16 going for about an hour and a half, so let's take a
17 break. And if we can go off the record.

18 THE VIDEOGRAPHER: Okay. We are now
19 going off the record. The time is 11:42.

20

21 (A brief lunch recess was taken.)

22 THE VIDEOGRAPHER: We are now back on the
23 record. The time is 12:47 p.m.

24 BY MS. MAHARG:

25 Q. Hi, Ms. Lee, I think we can just start

September 22, 2022

1 recall which ones specifically at this time.

2 Q. Okay. And as you said before, it is an
3 iterative process. You may have future requests,
4 future revisions, future upgrades to the BMPs;
5 right?

6 A. Correct.

7 Q. You expect to be working with CDCR in
8 that process; correct?

9 A. Correct.

10 Q. Okay. I appreciate that. Going back to
11 Provision D, receiving water limitations. Again, I
12 think you drew the distinction before between
13 receiving water samples as opposed to let's call
14 them discharge samples; right?

15 A. Yes.

16 Q. Okay. And we also talked about
17 specifically MCSP Number 4 sampling location being
18 essentially taken out of the creek, out of Mule
19 Creek; right?

20 A. Correct, that's the downstream receiving
21 water sampling location.

22 Q. Right. Based on your experience and in
23 your opinion, can you determine whether the
24 receiving water limitations have been exceeded
25 based only on let's say one sample from MCSP 4, or

September 22, 2022

1 would you require more than that?

2 MS. MAHARG: Objection, vague and
3 ambiguous, incomplete hypothetical, calls for a
4 legal conclusion.

5 THE WITNESS: So all I have is one data
6 point or one sample from MCSP 4 and nowhere else?

7 BY MR. MARSH:

8 Q. Correct. Can you determine whether that
9 is exceeding receiving water limitations based on
10 that one sample point?

11 A. It can show exceedances in a water
12 quality objective, but that would not necessarily
13 lead to a conclusion that it was from MCSP. If you
14 don't have upstream receiving water data, that
15 would kind of tell you -- upstream of MCSP, that
16 would kind of tell you if that was a condition that
17 had already existed prior to, I guess, passing by
18 adjacent to MCSP.

19 Q. Right. So evaluating MCSP 4 would not be
20 enough, you would also want to take into account
21 what's happening upstream of the facility. Is that
22 fair to say?

23 A. That's correct.

24 Q. And why is that?

25 A. Well, again like I said, you don't know

September 22, 2022

1 if -- if you only have that one downstream data
2 point, if the discharges from MCSP had, in fact,
3 contributed to that or caused it without knowing
4 what the condition and the receiving water upstream
5 of MCSP was to begin with.

6 Q. Right. Is that typically referred to as
7 what the background is?

8 A. Yeah, I guess that's what you would call
9 it. We just call it upstream and downstream but,
10 yes.

11 Q. Okay. And is that true for metals as
12 well as E. coli?

13 A. Correct.

14 Q. Okay. And then similar to that question
15 I think you said you were trying to figure out
16 whether the facility caused or contributed, right,
17 that cause or contribute language you refer to?

18 A. Uh-huh.

19 Q. Now -- strike that.

20 Well no, I will go back to that. Are you
21 familiar with the concept of a mixing zone in regar
22 to --

23 A. Yes.

24 Q. Can you explain that?

25 A. A mixing zone is an area just downstream

September 22, 2022

1 of the discharge given a certain distance in which
2 the discharge itself mixes in with the receiving
3 water. So you get basically some possible
4 dilution.

5 Q. Okay. And if you are focusing on the
6 cause or contribute aspect, do you need to take
7 into account whether that sample from taken --
8 collected from the creek is within or outside of
9 that mixing zone?

10 MS. MAHARG: Objection, calls for a legal
11 conclusion and incomplete hypothetical, calls for
12 speculation.

13 THE WITNESS: That's how we select that
14 downstream receiving water location to make sure
15 that there is -- not to guarantee that there is
16 dilution but that it's appropriate, where we are
17 not hitting a location where it is totally a
18 hundred percent or 80 percent of discharge, but
19 maybe more of a better characterization of the
20 discharge as it mixes in with the receiving water.

21 BY MR. MARSH:

22 Q. Okay. And before the Water Board would
23 take enforcement proceedings and allege a permit
24 violation, would it need more sampling data than
25 let's say even two sample points, MCSP 4, and then

September 22, 2022

1 even if there was one sample taken upstream?

2 Before enforcement action, would it need more

3 sampling to determine whether the facility was

4 cause or contributing?

5 MS. MAHARG: Objection, calls for a legal

6 conclusion and speculation.

7 THE WITNESS: You would need something at

8 least at minimum that's statistically significant.

9 Number of samples that is.

10 BY MR. MARSH:

11 Q. Statistically two samples are not

12 statistically significant; is that fair to say?

13 A. Yeah, no.

14 Q. And you laughed, is that because two is a

15 pretty small number; correct?

16 A. It's like saying one is all it takes and

17 that's it.

18 Q. And that's incorrect; right?

19 A. That would be incorrect. You would want

20 to have a sample that kind of covers a whole range

21 of situations, I guess.

22 Q. Okay. Fair enough. Thank you for that.

23 And earlier today we were talking about

24 pharmaceuticals, and I think you said that you

25 weren't sure whether the presence of

September 22, 2022

1 REPORTER'S DECLARATION

2 I, Lisa Makowski, CSR 13400, declare as
3 follows:

4 That I reported the taking of the deposition of
5 the witness, ELIZABETH LEE, commencing on Thursday,
6 September 22, 2022, at the hour of 9:05 a.m.

7 That prior to being examined, the witness was by
8 me duly sworn to testify to the truth, the whole
9 truth, and nothing but the truth.

10 That I thereafter transcribed said shorthand
11 notes into typewriting and that the typewritten
12 transcript of said deposition is a complete, true and
13 accurate transcription of said shorthand notes taken
14 down at said time.

15 I further declare that I am not a relative or
16 employee of any party involved in said action, nor a
17 person financially interested in the action.

18 Dated this 18th day of October, 2022.

19

20

21 *Lisa Makowski*

22

23 Lisa Makowski, CCR 345

24

25